

## **PRACTICAL EVALUATION OF LEGAL ASPECTS RISK IN BANKING INDUSTRY**

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### **Abstract**

*As a financial intermediary, banking becomes economic perpetrator which sharing facilitates fund traffic through service transfer via electronic media. One of the problems of law in banking service is there is no regulation him giving fringes for activity of this electronic fund transfer, like legal fundament of transfer of fund, status ownership of fund transfer, protection of law for consignor and receiver of fund transfer in the case of mistake generated by bank party, domiciling lenders in this case liquidation bank or bankrupt. Above problems need order so that giving rule of law for service user of banking.*

*Legal risk can happened because of weakness legal aspect, which for example existence of prosecution, no law and regulation supporting, or weakness of alliance like do not be fulfilled by valid condition him contract or cordage of credit with debtor and collateral the imperfectness. Convergences both of legal system because of growth of Internationalizing market and economics (Pistor dan Philip, 1999). So, as multiplier effect of economic Convergences area, relevant law institutions with economic area also happened convergence. With economic area also happened convergences? Despite of economic convergence which cause at convergence in law area, practically do not all law aspects having the character of procedural do not there are convergence.*

*The result paper is (1) the happening of attitude law dualism better as an matter which are positive and can more facilitate regulation which is and accommodative of conducive for requirement of business and economic. Other Important factor that is policy of economics conducted by government of Asian nations become key which is determinant for friction and change of system punish in many of Asian States among 1960 till in this time. But that way, solidarity of system punish this not yet earned to be claimed as convergence full and totalize from both continental system and Anglo of Saxon, because other aspect which have the character of procedural formed from many histories, cultural and tradition punish the each state. (2) Applying of must be done the full awareness of commitment the highness from various party and circle. In monetary context and banking, this matter will become duty each every peripatetic company element in financial sector and banking, monetary association and banking, BPPN, as well as Central Bank. (3) Change of paradigm concerning roles of law, and also from law keeping abreast of society and economics 'becoming' law which orienting forwards capable to anticipate and accommodate and also link the problem of economics and law in national society, but also accommodative and can integrate with relevant international rule, becoming an urgent requirement for growth of law and economics.*

**Key words:** legal aspects risk, banking industry, practical evaluation

### **INTRODUCTION**

Difficulty befalling economics of Indonesia, especially since the happening crisis 1997 still take place this year, possible needn't happened for example corporate world seriously execute healthy company's finance management principles namely for example balancing capital structure in such a manner so that need short-range really



defray from defrayal sources short-range, while need meter long defrayed from long-range defrayal source. Intrinsically the concerned capital structure is mirroring counter balance between long term liabilities and capital alone from company. Repair corporate world capital structure is compulsion to improve efficiency and tighten company competitiveness in face emulation progressively sharply especially in era globalizes. Repair efforts can be conducted one of them paid attention aspects good governance corporate, study and research into more and more various good institutions environment national and international. Globalization marked with existence the compression have altered map of economics, political, and cultural. Movement service and goods happened faster. Capital from state changes over to other state in second calculation effect exploiting information of technology. In line with the banking activity as main economics of nation does not miss from globalization impact. In running function of intermediary, banking becomes economic perpetrator sharing facilitates fund traffic through service transfer via electronic media. One problems law in banking service is there is no regulation giving fringes for activity electronic fund transfer, like legal fundament transfer of fund, status ownership of fund transfer, protection law consignor and receiver of fund transfer in the case mistake generated part of bank, domiciling lenders in this case liquidation bank or bankrupt.

Above problems needing order to be giving rule of law for service banking user other law aspects in finance-related and banking also coloring many problematic in economic areas and law, for example deviation of BLBI, confronted with principles prudential degradation of function of intermediacy banking, phenomenon appearance of fee-based income in banking practice and various problem other of law economic, the things require to obtain get our attentions. Applying carefulness principle (principles banking prudential) in entire activity isn't one of way to create healthy to banking, turn will affect positive to economics macro. The principal implementation have to totally, do not only concerning problem giving credit, but started the bank moment founded, determination of management fulfilling sufficiency test and eligibility (fit and proper test) do not have the character of ceremonial.

Rule of Indonesia Bank obliging fit and proper test for official member of bank still have many weakness, like still enabled by official member him which do not pass test to stand at bay although have to personally responsibility. Besides that, in giving amenity access to all clients, hence usage ATM machine, charge and card of credit card have potency to harm client through account leaking, damage machine and other technical mistake which not yet touched by law fringe. Bank obligation to provide peaceful and competent machine ought to relate selected standard, periodical ought to be re-calibrated. During the time there is no same concerning competent machine standard to be operated. Case indicating that loss of caused client improper him used machine have quite a lot pushing the making standardization every used technologies. Without existence of jurisdiction institute, banking practice need the banking solving case handled by professional, guarantying economics stability, trust and society. Banking case handled by verbiage, publication intensively and jurisdiction do not independent, will demolish banking reputation. Therefore, need the existence of idea to create solution mechanism is efficient, effective and remain take care reputation other banking important matter to relating Institute Guarantor of Deposit. As such in commending by UU Banking, forming of Institute Guarantor of Deposit have to immediately is possibly realized to catch up will be abolished by



government obligation as guarantor and end duty of BPPN. The law aspect needs to be paid attentions statutory of Institute Guarantor of Deposit, acquirement guarantee of fund and exploiting guarantee of fund, must be poured in clear regulation. Besides, relating to have ending duty of BPPN law aspect need to be paid attention by statutory of Institute Guarantor of Deposit, acquirement guarantee of fund and exploiting guarantee of fund, must be poured in clear regulation. Besides, relating to have ending duty of BPPN, need the existence of institute whereas commissioned comparing with capital market institute have owned BAPMI (Body of Arbitrage Capital Market Indonesia) finishing all obligation of BPPN, especially transactions have been conducted and even possibility of prosecution, if management asset of BPPN have conducted deed or mistake contempt of court. In the effort to cover number of internal issues practice monetary and banking of national course is not easy matter to be discussed in a brief presentation, hence that relation this paper will cope to study furthermore essence from various problems have analyzing in the face of passing solution some aspects punish financial sector and banking, what under consideration will relate some especial problems related to law system problem, applying governance corporate good in financial system and banking national as well as law role in accommodating various phenomenon that happened in finance-related and banking.

## **SOLUTION**

### **Dualism System Punish**

System punish of Indonesia embracing system punish Europe Continental are base to all enforcers punish to use positive law the Europe Continental system in making every decision. But on the other side, quite a lot law and regulations financial sector and banking which is very influenced system punish Anglo of Saxon or Common Law. Application both the different law system in positive law in Indonesia at financial sector and banking in many matters have resulted disharmony can seen from arrangement consistent do not one same from both the law system which unite in same items. Suppose, in commerce of marketable securities without warkat (trading script less) is generally utilized technological application. This matter have come to public characteristic of commerce various developed countries and some states have other flower, including Indonesia. This practice script less trading only enabled accompanied with digital signature the unknown to in positive law system in Indonesia, to result commerce illegal so that cancel by itself or can be canceled. This cases is generally finished with an order having level of hierarchy lower of law.

This Matter earn conducted as long as do not happened dispute of law. Also in the case dispute of law, hence will become important matter to identification is system punish to be embraced by all enforcers of law?. The answer of course "positive law system of Indonesia namely system punish continental". But this situation in fact is challenge to all jurists in applying concept "punish as recondition medium" told by Prof. Mochtar Kusumaatmadja, beginning from concept "ace of law a engineering social of tool" of Roscoe Pound. Thereby, law has to be created for the sake of society and not on the contrary. But that way the problem of system dualism punish, can is also looked into as a positive convergence from two different law systems. Convergence both of system punish this caused the core important growth of internationalizing market and economics. Thus as affect multiplier of convergence in economic area, hence at relevant law departments with economic area also happened



convergence. Despite economic convergence because convergence law area, practically do not law aspects having the character of procedural do not there are convergence. This matter can be caused by difference tradition and culture punish in each countries. With the approach of inescapable meeting from both this different law system, hence this convergence earn more facilitate regulars was accommodative conducive for requirement of business and economic. Proper is also noted other important factor that is policy of economics conducted government of Asia countries becoming key which was determinant for change of system punish between 1960 till this moment.

### **Applying Good Corporate Governance (GCG)**

To be corrected reading citation following:

*"Good corporate governance of banks is the sine qua non of a sound banking system. For individual banks it can reduce the cost of capital and enhance shareholder value. The Asia Banking crisis has, in part, been attributed to serious inadequacies in the governance of banks. Governance restructuring will have to accompany bank restructuring. If the latter is to be sustainable. Good bank governance may not work in isolation. It will need to be accompanied by good governance in the major constituents of the economic including the governance of central banks, banking supervisory agencies and in the corporate sector. The post-crisis period has created an environment where most of the major actors in Asia are now willing to implement governance reforms. Not only as a way to ensure survival, but also as a competitive weapon".*

For company, GCG is asset and need investment and commitment. Culture of governance has to be grown the including decision making aspect in management. Benefit list of compliance to GCG have enough of length, all have estuaries to the going up stockholder added value. Follow the example conceit is private enterprise debt which in bailed by policy 'guarantee blanket' solely prove that partly especial sector cooperate ought to become especial player of economics no longer function as state asset. This private enterprise become liability was action of generated new debt which must be accounted on rank by children, our chirp and grandchild. Weaken this corporation sector have caused more and more far from the role 'growth of engine' or as development pre-eminent. Economic have changed over to fiscal economics, economics of APBN, with the meaning as long as peaceful APBN hence that way also economic performance. On the other side, we still lucky because still have UKM (Small Medium Enterprises) and high informal sector of energy to arising out distortion. This sector is capable to permeate labor force and also excite market mechanism through supply and demand. Amount of obligation flowers which isn't government that is what still can turn around economic wheel. Town is live in 'park'. Role of flower very dominant oppositely sector banking live to pluck 'flower' whether that from governmental obligation and SBI. Acceptance of operational banking small us relative disbanding with acceptance others. Acceptance of flower including into group others. For the reason with all energy we have to can take care government do not break a promise (default) in the accomplishment obligation paying flower. Default only meaning and one would start to behold at second banking crisis.

The root cause from the weakening of macroeconomic foundation of Indonesia proved in study conducted by Asian Development Bank (ADB) in the year 2000 in some Asian states of East, specially Indonesia, Korea, Philippines and



Thailand, concluding that: dramatic suffers that countries of Asian ace corporate governance in weaknesses identified have crisis financial during fortune of reversals one of fortunate in meltdown economic there to led that vulnerabilities sources 1997. The President of Asian Development Bank, Mr.Tadao Chino has said that “.... Dynamic proper achieving to critical is sectoring private A, growth....” as economic sustainable. In this case the hand in glove corporation sector bearing with effort indirect and direct good poorness. In the same opportunity, statement of tone is also submitted by many representing developed countries and representing developing countries, in this case they were important meaning underlying and role of GCG and strategic meaning role private sector in development. Corporation sector capable to share positive for development of economics are corporation sector is national asset and them only becoming societies parasite and burden. Sector group of cooperation which bows to arranged good corporation management, obedient rule the game and regulation invitation applying. Equally, they capable to be it principal are good corporate governance (GCG) in running the effort. In life in this time GCG have to commitment and require investment. Forming some committees like Committee Audit, Committee Budget and others, including also lifting of Commissary and Independent Board of directors will cost money.

That way also isn't it transparency, and accountability of responsibility need socialization and publications which do not neutral budget. Benefit has many GCG boost up added value stockholders of company. But, change activity ethos and culture do not also easy to improve the way of decision making and change management behavior. In many facets, applying new GCG come up with phase of rhetorical. Disinclination apply GCG more caused by attitudes assessing that GCG as burden and is not as company asset. Thereby difficult GCG started if people still behave skeptic. This matter seen from still number opinion that GCG needn't for any sanction and incentive. Company do not apply GCG is assessed also, because principle openness company for whereas assumed more negativities. But on the other side, quite a few easy companies feel added value application of GCG, like more young access to international capital market and also to the number investors readying to pay higher level premium for company share which have applied GCG. In this relation presumably need also emboldened applying special label for company have applied GCG like given special ISO for GCG.

Companies have applied GCG will bring flag bonafids other positive effect is can recruit existing best energy labor market at the moment, energy professional more behave critical in searching work this professional energy group only wishing to join forces with best company was including the compliance business ethics practice. Put hand to company which is “not good” will only bring debacle. The employees will always joints when company gets the problem. Therefore also, oriented shareholder paradigm has shifted to GCG basically include business ethics, this ethics corps is loaded in code of GCG. Required is voluntary than corporation part in obeying code. There no sanction for them which do not adhere him because it is true in character compliance voluntary. Code or guidance kind this usually is also published institute/profession association don't have public authority, for example Perbanas. In execution, so that guidance a kind of this can be forced, hence this guidance has to be released by institution/institute having authority arrange. Therefore also, many rules guidance of GCG taken over law and regulation applying and society obliged to obey (compliance mandatory). Here earn applying sanction to trespassers. For example is



rule concerning GCG practice in UU Limited Liability, UU Capital Market, UU Banking as well as the regulation.

Many developing countries, execution GCG more push caused by having cold feet to existing sanction, or fear to powers. Regulation applying to provide various civil sanction and crime, to trespassers more than anything else in this time where more uppermost remedial ultimo of remedial primo. This is obedient attitude to GCG having the character driven regulatory and because motivation professional and driven of ethic driven. Something else which also require attention are that GCG have to be considered to be abstract asset (intangible asset) to give result return the adequateness in the case giving added value to stockholders. GCG also have to weigh become or culture company can exploited in course decision making and also become guidance behavior management principles of responsibility; accountability, fairness, and transparency was first time introduced OECD become elementary principle which adopted and adaptation many institutions in compiling guidance of GCG. In banking context, if a bank public go, hence the share price market have to express fourthly elementary principle efficient and effective market only market capable to express price have accommodated all existing information. Culpable practice trading insider for example, do not express actual cost because information able to influence price only owned insiders doing commerce's. Last survey of Mc Kinsey in the year 2002 proving that investor ready to pay for premium. For their Indonesia ready to pay for premium equal to 27% a conclusion which can pulled from survey it is that progressively lower cultural level of GCG at one particular state hence premium to be given excelsior will to company applying GCG. In this case, all investors will very esteem company management dares to do positive in arranging the company management although environment do not support. Thereby, there is no alternative, for a bank is trust business institute besides applying concept of GCG intended. That way also board of directors and commissary have resided in nuance and era management business changing where the high company energy to various crisis and high, only company arranged management which is have nuance to GCG. As lender of the last resort, Central Bank also has to release guidance of GCG able to follow by banking circle. In guidance having the character of this voluntary, have to be loaded fundamental matter where the obligation of accomplishment having the character mandatory system reward punishment and have to be introduced. Till in this time, there is no one bank even also capable to fly flag of GCG. There is no benchmark for bank is GCG fully.

*"The legal framework in a country is as vital for economic development as for political and social development. Creating wealth through the cumulative commitment of human, technological and capital resources depends greatly on a set of rules securing property rights, governing civil and commercial behavior, and limiting the power of the state.... The legal framework also affects the lives of the poor and, as such, has become an important dimension of strategies for poverty alleviation. In the struggle against discrimination, in the protection of the socially weak, and in the distribution of opportunities in the society, the law can make an important contribution to a just and equitable society and thus to prospects for social development and poverty alleviation"*

Statement optimism of the World Bank is worthwhile reference to discuss role of law in development. Essence the statement for example underlying that framework punish in state is very necessary for growth of economics, social and political good



arranged law framework since early will create good domino effect various sector life have state, conversely. In tired framework target various development and law growth have to show the role. In the bearing with elementary framework national development, law realize x'self in two face, that is one tight law part of x'self as development aspect, mean that law was bound as factor of development need to get priority in effort is straightening and development. On the other hand punish that have to be viewed as reconditioned medium and development society to determine efficacy of efforts national development. Relating to problem is contractual terms with this development, there is various concept raised expert law. In general they have a notion that in executed development, functioning law not just "ace control social of tool" or functioning as a means maintain stability, but as told Roscoe Pound, law also function as "ace engineering" social of tool. Referring to this matter Sumaryati Hartono have a notion, compilation of UUD 1945 in fact bolt futuristic filsafah for example told Roscoe Pound, and known as law philosophy which see role law as engineering social tool. This philosophy in Indonesia completed by Mochtar Kusumaatmadja as philosophy giving role to law as development medium was approach in the reality is true have been applied by compiler of UUD 1945<sup>17</sup>. The law only the holding on to arrange, governing, forcing, and also prohibit etcetera, without asking do rule was making can be run effectively. Therefore, in "social engineering" this vital importance feedback, so that arrangement always can be adapted for situation arising out society. If that law is seen as supporter medium to development hence function punishes that have to have selected pattern. Concept of Mochtar Kusumaatmadja felt to have scope very wide more than Roscoe Pound alone as first person isn't it function punish as tool like him explaining, it mean wide hence that law not even is the overall of methods and grounds arranging human life in society but cover also institutes (processes and institutions) realizing to have applying methods in reality. In this system punish development cover all activity and action strengthening infrastructure punish like legal institution, organizational law profession, institutes education law and also everything with reference to solution of special problem. Conception punish development in harmony with new orientation understanding law told by A. Vilhem Rusted saying that law is legal action in machinery that is as unity including all method both for written and unwritten, like police, public attorney, justice, advocate and situation of personal x'self than enforcer individual punish itself even also faculty law as institute higher education of law. Thereby paradigm punish in response to arising out problems' have to be turned into paradigm laws capable to see forwards to possibilities the happening civil case and unprecedented crime before all as effect opened world cyber. Growth of technology not even grow economic growth, however also open opportunity for arsonist to exploit world become and seamless of borderless, example is relevant with the happening opportunity badness like action wash money and also the existence free foreign exchange regime which have been embraced Indonesia about three decade lately. Other example is applying system single entry for monetary accountancy gone into effect government ICW one part and other party are requirement to apply system double entry as according to International Monetary Standard is fact which very seethe with excitement?.

This time have there are adjustment rule of legislations state's finance, for example isn't it him of UU State's Finance (2003) to follow with UU Exchequer of State and also UU Auditing of State. Both last rule and still in the form draft of law in this time are intensive under consideration between government and DPR expected



finish in year 2003. This matter is responsive example punish to requirement of economics although very overdue. As supplementary information, solution concept UU State's Finance has been tilled do not less than 15 team since 30 last year.

## CONCLUSION

The happening of attitude law dualism better as an matter which are positive and can more facilitate regulation which is and accommodative of conducive for requirement of business and economic. Other Important factor that is policy of economics conducted by government of Asian nations become key which is determinant for friction and change of system punish in many of Asian States among 1960 till in this time. But that way, solidarity of system punish this not yet earned to be claimed as convergence full and totalize from both continental system and Anglo of Saxon, because other aspect which have the character of procedural formed from many histories, cultural and tradition punish the each state.

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